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IN THE

Supreme Court of the United States

October Term, 1991

Connecticut Bank and Trust Company,
National Association, *et al.*,

Petitioners,

v.

Wilmington Trust Company,
and
United States District Court for the District of Hawaii, *et al.*

Respondents.

PETITIONERS' BRIEF IN REPLY TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Pursuant to Rule 15.6 of the Rules of this Court, Petitioners Connecticut Bank and Trust Company, National Association, and Wartsila Marine Industries Inc. respectfully submit this brief in reply to Respondents Wilmington Trust Company and the International Organization of Masters, Mates & Pilots' brief in opposition to the Petition for Certiorari.

Respondents attempt three basic arguments in their brief in opposition: (1) the Ninth Circuit's decision has not emasculated Federal Rule of Civil Procedure 9(h); (2) the Ninth Circuit's decision upholds the International Organization of Masters, Mates and Pilots'[1] (the "Union's") constitutional right to a jury trial with respect to its claims at law; and (3) the Ninth Circuit's decision is not in conflict with the decisions of the United States

[1] Respondent Wilmington Trust Company has no claims at law.

Court of Appeals for the Fifth Circuit. Respondents are wrong on each point.

I. THE NINTH CIRCUIT'S DECISION EMASCULATES RULE 9(h).

Respondents argue that the Ninth Circuit's decision does not emasculate Rule 9(h) of the Federal Rules of Civil Procedure because it merely rejects the argument that an admiralty plaintiff by invoking Rule 9(h) can prevent another party from having a jury trial on its own claims at law properly joined in the admiralty action. But the Ninth Circuit's decision goes far beyond this proposition, and, in the context of the facts of this case, is startling in its reach. The Ninth Circuit's holding is:

> Therefore, we hold that Wartsila's election to proceed in admiralty does not deprive the Union of a jury trial on the Union's properly joined claims. We note that our holding may result in the entire case being tried before a jury. This result is likely to occur if all the claims are closely related factually. *See, e.g., Fitzgerald*, 374 U.S. at 21, 83 S.Ct. at 1650 (all claims must be submitted to jury when they "arise out of one set of facts.")

Wilmington Trust Company v. United States District Court for the District of Hawaii, 934 F.2d 1026, 1032 (9th Cir. 1991) (Appendix A at 13a). The Ninth Circuit's decision allows a party in an admiralty action not only to assert a jury trial right with respect to claims at law joined in the admiralty action, but also to defeat the plaintiff's election under Rule 9(h) where the claims at law are not involved in the admiralty case but the admiralty claims are "closely related factually" to the added at law claims. And that defeat comes under the Ninth Circuit's decision at the hands of the Union, which was not a part of the

admiralty case, on a claim against companies that also were not original parties to the admiralty action.[2]

The jury trial demand was made by the Union, a permissive intervenor. The Union is the only party asserting claims at law. The Union was not sued by any party nor did it have any admiralty claims. The district court, nonetheless, permitted the Union to intervene in the admiralty action and permitted it to assert its claims at law not against the admiralty plaintiff, Petitioner Connecticut Bank and Trust Company, National Association ("Connecticut Bank"), but against two Finnish corporations, Petitioner Wartsila Marine Industries Inc. and Oy Wartsila Ab. Neither was a party to the admiralty action, but had to be joined as defendants for the purposes of the permissive law claims only.[3] This is not a case where the defendant in an admiralty action files a compulsory counterclaim at law and demands a jury trial.

If the Union is able to defeat Connecticut Bank's Rule 9(h) election on these facts, then under the Ninth Circuit's decision, an admiralty plaintiff's election under Rule 9(h) can easily be nullified any time someone can inject itself into an admiralty action and assert "factually related" claims at law – even if the claims are not against the original admiralty plaintiff. It is difficult to imagine a case where an artful lawyer will not be able to plead "factually related" claims at law, obtain intervention and then defeat the plaintiff's Rule 9(h) election.

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[2] Wartsila Marine Industries Inc. and Oy Wartsila Ab were not original parties to the admiralty action.

[3] Although the Union originally claimed federal question and diversity jurisdiction as the predicate for its claims at law, the district court dismissed all of its federal claims and found that there was no diversity of citizenship jurisdiction with respect to its remaining common law fraud claim. Nonetheless, the district court retained the Union's fraud claim, employing the dismissed federal claims as the basis for pendent claim jurisdiction.

Respondents incorrectly assert that this result is warranted because there is "no right to a non-jury trial of a maritime claim." Opposition at 12-13. Respondents' citation to this Court's decision in *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963), as support for this proposition is misplaced. In *Fitzgerald*, this Court permitted the plaintiff, an injured seaman, to join a maritime claim for maintenance and cure with a statutory Jones Act claim and to have both claims tried to a jury at law because they were factually related and the Jones Act granted a *statutory* jury trial right. While this Court permitted a maritime claim to be tried to a jury in that unique circumstance on the grounds of judicial economy, it did not hold in *Fitzgerald*, and has never held, that an admiralty plaintiff has no right to have its maritime claim tried to the bench by invoking Rule 9(h).

Moreover, Respondents' assertion plainly contravenes the unambiguous intent of the drafters of Rule 9(h) to preserve the right of an admiralty plaintiff to have its admiralty claims tried to the bench following the unification of the admiralty and civil rules of procedure. *See* Fed. R. Civ. P. 9 advisory committee's notes at 42-43 (West 1991). The advisory committee explicitly stated that it was its intent in drafting Rule 9(h) to

> [p]rovide some device for preserving the present *power* of the pleader to determine whether these historically maritime procedures [including a non-jury trial] shall be applicable to his claim or not . . . .

Id. (emphasis supplied).

The Ninth Circuit's decision threatens to make Rule 9(h) a nullity by allowing another party, even one having no admiralty claims, to defeat an admiralty plaintiff's Rule 9(h) rights by joining claims at law made soley against a party added to the admiralty case. Whatever the proper result, where a real conflict exists between an admiralty plaintiff's Rule 9(h) election and an admiralty defendant's constitutional right to a jury trial on at law

compulsory counterclaims, the Ninth Circuit's ruling in this case so overreaches that it, as a practical matter, reads Rule 9(h) out of the Federal Rules. Neither decisions of this Court nor the legislative history of the unification of the admiralty and civil rules supports such a result. Indeed, precisely the opposite was intended. In short, this case presents an important issue in the interplay of civil and admiralty jurisdiction and the extent to which Rule 9(h) in fact preserves the historically maritime procedures in cases with the admiralty jurisdiction of the district courts.

II. RESPONDENTS HAVE NO CONSTITUTIONAL RIGHT TO A JURY TRIAL IN THIS ADMIRALTY ACTION.

Respondents also assert that the Ninth Circuit's decision properly protects the Union's Seventh Amendment right to a jury trial on claims at law under the authority of *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Contrary to Respondents' assertions, *Beacon Theatres* does not apply to admiralty actions, and therefore does not provide any constitutional right to jury trial for claims at law voluntarily joined in admiralty actions. In *Beacon Theatres*, this Court held only that when claims at law are joined with claims in equity *in an action at law*, the issues determinative of the claims at law must be tried first to a jury based on the Seventh Amendment's guaranty of a jury trial in common law actions. 359 U.S. at 509-10. This Court has never held that there is a constitutional right to jury trial for claims at law voluntarily joined in admiralty actions. Indeed, this Court has explicitly held that the Seventh Amendment does not apply to admiralty actions. *See Waring v. Clark*, 46 U.S. 441 (1847). And, there is no reason to stretch the Seventh Amendment guaranty to a situation where the joinder of the law claims is wholly permissive.

The Union's attempt to wrap itself in the mantle of the Seventh Amendment ignores the critical fact that it was the

Union which voluntarily chose to intervene and to assert its claims at law in the admiralty action. The Union is a permissive intervenor which filed permissive claims against two defendants who were added for the purposes of the law claims only. The Union was not a defendant who was forced to file compulsory counterclaims at law. The Union was free to file its claims in a separate action at law with the attendant right of a jury trial and without the fear of the application of *res judicata* or collateral estoppel, because neither the Union nor the defendants to the law claims – Wartsila Marine Industries Inc. and Oy Wartsila Ab – were parties to the admiralty action. By accepting the Union's argument that its claimed right to a jury trial must be preserved at all costs, the Ninth Circuit has not only emasculated Rule 9(h) but has also condoned a manipulation of the Federal Rules of Civil Procedure that runs counter to the declared intention of those who wrote Rule 9(h). *See*, Fed. R. Civ. P. 9 advisory committee notes at 42-43 (West 1991).

III. THE NINTH CIRCUIT'S DECISION CONTRADICTS THE DECISIONS OF THE FIFTH CIRCUIT.

Respondents erroneously argues that the Ninth Circuit's decision is not in conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968 (5th Cir. 1978). Respondents attempt to distinguish *Harrison* by arguing that it only stands for the proposition that a plaintiff has the right by invoking Rule 9(h) to have its admiralty claim tried to the bench. Respondents argue that because the admiralty plaintiff in *Harrison* amended its complaint to state an admiralty claim under Rule 9(h) against the fourth party defendant, the Fifth Circuit never reached the issue of whether the fourth party defendant was entitled to a jury trial on the non-admiralty fourth party indemnity claim.

Respondents' technical point misses the plain language and the careful reasoning of the Fifth Circuit's holding in *Harrison*, which is directly in conflict with the Ninth Circuit's decision in *Wilmington Trust*. The Fifth Circuit specifically stated that it would not allow other parties to the action to emasculate the plaintiff's right to a non-jury trial under Rule 9(h). 577 F.2d at 986. The *Harrison* court also cited as support for its holding, among other cases, *Alaska Barite v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), which squarely held that a defendant could not undermine the Rule 9(h) election by filing a permissive counterclaim at law. Id. Following Wilmington Trust, the district court's decision in *Alaska Barite* is no longer good law in the Ninth Circuit. Finally, the Fifth Circuit relied heavily on the advisory committees's notes to Rule 9(h) ignored by the Ninth Circuit: "One of the important procedural consequences is that in the civil action *either party* may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute . . . ." 577 F.2d at 985. In sum, it is clear that the Fifth Circuit held in *Harrison* that other parties cannot emasculate an admiralty plaintiff's right to a non-jury trial under Rule 9(h) simply by interposing a claim at law and demanding a jury trial.

The Ninth Circuit's decision in *Wilmington Trust* is inconsistent with the Fifth Circuit's decision in *Harrison*. This Court should grant the Petition for Writ of Certiorari to resolve this conflict between the circuits.

IV. CONCLUSION.

Because the Ninth Circuit's decision in *Wilmington Trust* emasculates well-established rights of admiralty plaintiffs and is in conflict with the Fifth Circuit's decision in *Harrison*, Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted

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